Supreme Court, U.S.
FILED

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No. ——

IN THE

Supreme Court of the United States

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR WRIT OF CERTIORARI

SUSAN L. KELSEY *
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

* Counsel of Record

Counsel for Petitioner

July 26, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution require that a state taxing the full and unapportioned value of transactions in interstate commerce provide taxpayers a credit for taxes paid on the same goods in other jurisdictions?

2. Does the Commerce Clause of the United States Constitution require a state to have nexus with the taxpayer, in addition to nexus with the transaction, in order to tax a transaction in interstate commerce?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14.1(b) and 29.6, the following list identifies all of the parties to the appellate proceeding in the District Court of Appeal of Florida, First District, whose judgment and opinion are sought to be reviewed.

Appellant below: TA Operating Corporation, formerly d/b/a Truckstops of America, now d/b/a TravelCenters of America. The parent company is TravelCenters of America, Inc. No publicly held company owns 10% or more of TA Operating's stock.

Appellee below: Florida Department of Revenue.

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FLORIDA DEPARTMENT OF REVENUE,
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On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR WRIT OF CERTIORARI

Petitioner TA Operating Corporation, d/b/a TravelCenters of America, respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the District Court of Appeal of Florida, First District, denying TA Operating a refund of Florida excise taxes paid on diesel fuel immediately exported to Georgia, despite the fact that TA Operating had absolutely no presence in Florida and paid Georgia's excise taxes on the same fuel without receiving a credit against the Florida taxes.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District, reported at 767 So. 2d 1270 (Fla. Dist. Ct. App. 2000), is set forth in Appendix A. The order of the Supreme Court of Florida declining review is set forth in Appendix B. The judgment entered by the Circuit Court in and for Leon County, Florida, is set forth in Appendix C.

JURISDICTION

The District Court of Appeal of Florida, First District, issued its opinion on September 28, 2000, rejecting Petitioner's claim under the Commerce Clause of the United States Constitution that Petitioner was entitled to a refund of Florida excise taxes it paid on diesel fuel pumped directly from the loading rack at a terminal in Florida into a common carrier's tanker trucks, and exported immediately to Georgia for resale, where Petitioner also paid Georgia's excise taxes on the same fuel. Petitioner timely filed a petition for discretionary review in the Supreme Court of Florida. The Supreme Court of Florida denied the petition on April 27, 2001. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, the pertinent portion of which is set forth below:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.

U.S. CONST. art. I, § 8, cl. 3.

This case also involves several Florida statutes, which are set forth in Appendix D. They are Florida Statutes § 206.87 (West 1993), which imposes an excise tax of 4 cents per gallon on the first sale or transfer of title in the State of special fuel used or sold for use in Florida (App. 21a); Florida Statutes § 206.86(1) (West 1993), which defines "special fuel" to include the diesel fuel at issue here (App. 21a); and Florida Statutes § 206.86(5) (West 1993), which defines "use" of fuel as placing it into a receptacle on a motor vehicle for propulsion of that vehicle (App. 22a).

STATEMENT OF THE CASE

This Petition seeks review of a Florida court decision denying Petitioner a refund of Florida fuel excise taxes[1] imposed on Petitioner's purchase of diesel fuel from a terminal in Florida for immediate export via common carrier to Georgia, where Petitioner paid Georgia's full excise taxes on the same fuel.

TA Operating owns a nationwide network of truckstops that sell gasoline and diesel fuel at retail. App. 2a. n.1. At all times pertinent to this case, TA Operating had ***no*** place of business in Florida, ***no*** personnel in Florida, ***no*** sales in Florida, and ***no*** license for retail sale of diesel fuel in Florida. *Id.* at 2a. TA Operating owned a truckstop in Brunswick, Georgia, for which the nearest wholesale fuel terminal was in Jacksonville, Florida. TA Operating purchased diesel fuel from the Jacksonville terminal facility, pursuant to contracts providing that title to the fuel passed in Florida. The fuel was pumped from the terminal loading rack directly into a common carrier's tanker trucks,[2] which transported the fuel

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[1] The excise tax of four cents per gallon on diesel fuel used or sold for use in Florida was imposed on the first sale or transfer of title in the state. Fla. Stat. § 206.87(1) (West 1993) (App. 21a). *Id.* The state statute recognized exemptions from the tax if required by the United States or Florida Constitutions. Fla. Stat. § 206.87(3) (West 1993) (App. 21a). TA Operating claimed, among other things, that the sales at issue were exempt from the tax under the Commerce Clause of the United States Constitution.

[2] The logistics of this transaction repeat themselves around the clock and around the country, and involve their own vernacular. Tanker trucks, usually having a capacity of 8700 gallons of fuel each, drive onto a platform under what is called a 'loading rack,' a mechanism through which fuel from a refiner's or wholesaler's large storage tank or pipeline is pumped into the truck's storage tank for transportation (***not for propulsion of that vehicle***). The facility at which this occurs may be called a 'terminal' or sometimes more loosely a 'tank farm.' Thus, in the vernacular the price charged for the fuel at this point is a 'rack price,' and

immediately over the state line to TA Operating's truckstop in Brunswick, Georgia. *Id.*

TA Operating paid both a Florida excise tax on the entire volume of the diesel fuel purchased, and a Georgia excise tax on the entire volume of the same fuel as it was sold to consumers in Georgia. *Id.* Florida's taxing scheme did not provide a credit for taxes paid on the same fuel in other jurisdictions. *Id.* Therefore, TA Operating sought a refund of the Florida taxes, raising the Commerce Clause questions in its complaint in state circuit court; again in its initial and reply briefs on appeal to the District Court of Appeal of Florida, First District; and again in its brief on jurisdiction attempting to obtain the discretionary review of the Supreme Court of Florida. Each Florida court rejected Petitioner's arguments. App. 1a, 16a, 17a.

The Florida trial court rejected Petitioner's claim on the grounds that Petitioner's failure to hold a Florida license as a dealer in special fuels was an absolute bar to any constitutional protections otherwise afforded by the Commerce Clause. App. 18a. The District Court of Appeal of Florida, First District, rejected that reasoning, but nevertheless affirmed the refund denial on the grounds that Florida's tax satisfied each of the four Commerce Clause requirements this Court established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977): (1) substantial nexus, (2) fair apportionment, (3) lack of discrimination against interstate commerce, and (4) fair relationship to services provided by the state. 430 U.S. at 279. The Florida court arrived at its conclusion that the Commerce Clause did not require Florida to provide a credit for taxes paid on the same fuel in other jurisdictions by shrugging off a contrary decision of this Court with no more than the negative introductory signal "*but see*." App. 11a

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a state's tax on this transaction is imposed 'at the rack,' or is called a 'rack tax.' *See, e.g., E.S. Bills, Inc. v. Tzucanow*, 194 Cal. Rptr. 343, 345 n.1 (1983) (explaining terminology).

(citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166-67 (1954)). The Florida court also announced that the law did not require Florida to have any nexus whatsoever with TA Operating in order to impose the tax. App. 8a. The Supreme Court of Florida declined to exercise its discretionary jurisdiction to review the case. App. 16a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for two reasons. First, the decision below conflicts with this Court's own decisions on issues that are fundamental and important to Commerce Clause jurisprudence. Far from merely disagreeing with Petitioner on the application of the law to the facts at bar, the Florida court departed from this Court's precedents and announced incorrect rules of law both with respect to the internal consistency aspect of the fair apportionment test, and with respect to the substantial nexus test, of *Complete Auto Transit*. Whereas this Court has made it clear that the internal consistency test requires a *hypothetical* replication of the tax scheme in every state to determine whether the danger of impermissible multiple taxation exists, *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184-85 (1995), the Florida court refused to engage in that hypothetical analysis after concluding summarily that the taxable event could not *actually* be replicated in every state. App. 10a-11a. Further, whereas this Court has made it clear that a taxing state must have substantial nexus with the taxpayer *in addition to* substantial nexus with the transaction, *Quill Corporation v. North Dakota*, 504 U.S. 298, 306 (1992), the Florida court announced that "No additional taxpayer nexus requirement exists." App. 8a. The Florida court's decision thus reflects fundamental errors of law justifying issuance of the writ and reversal of the decision below.

The Florida court's erroneous analysis in *TA Operating* creates confusion in this Court's Commerce Clause jurisprudence, upon which Florida and other taxing jurisdictions

may be only too eager to capitalize. *See, e.g.*, Shop Talk: *Florida Special Fuels Excise Tax Upheld Against Commerce Clause Challenge*, 11-Mar. J. Multistate Tax'n 38 (2001) (noting that the Florida court in *TA Operating* departed from this Court's precedents and evaded TA Operating's argument on the taxpayer nexus question in particular). A state's attempt to tax an out-of-state taxpayer raises the threshold constitutional question of whether the state has that authority at all. *See Quill*, 504 U.S. at 306-08. The question of the existence of the power to tax, and Commerce Clause limitations on that power, are of constant and considerable importance nationwide to taxpayers and taxing authorities alike, yet the myriad factual scenarios of practical application often spawn confusion. The greater the clarity and force of the jurisprudence, the better protected are taxpayers' rights, and the better delineated are taxing authorities' obligations. This case presents simple and undisputed facts that create an excellent vehicle for making clear the critical nuances of Commerce Clause protections in an area of the law that has been, and will remain, of recurring interest throughout the country. Accordingly, the Court should grant the writ and reverse the judgment of the Florida court.

The second reason the Court should grant the writ is that the Florida court's decision represents yet another instance in which the Florida courts have subrogated taxpayers' constitutional rights to the State's desire to retain unlawful tax revenues. This Court repeatedly has admonished the Florida courts to comply with federal constitutional provisions mandating taxpayer relief from unlawful taxes, but the Florida courts repeatedly devise creative avoidances, which for the most part evade higher scrutiny.

Among other cases illustrating Florida's propensity to resist refunding unlawful taxes is *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). In *McKesson*, this Court noted that the tax at issue

was virtually identical to a tax this Court had found unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), having been changed only cosmetically in response to *Bacchus*. *McKesson*, 496 U.S. at 20. The Supreme Court of Florida had acknowledged that the taxes at issue were unconstitutional, but refused to require the State to refund the taxes already paid. This Court ordered retrospective relief. 496 U.S. at 22.

The District Court of Appeal of Florida, First District (the same court whose decision is at issue here) subsequently refused to enforce a taxpayer's right to a refund of unlawful taxes because the taxpayer had not utilized a refund procedure recognized for the first time in that very decision. *Newsweek, Inc. v. Department of Rev. of Fla.*, 689 So. 2d 361 (Fla. Dist. Ct. App. 1997). The Florida Supreme Court declined to review the case, as it did here. Upon Newsweek's petition for writ of certiorari, this Court summarily reversed, instructing the Florida courts to allow Newsweek to utilize existing refund procedures. *Newsweek, Inc. v. Department of Rev. of Fla.*, 522 U.S. 442, 442 (1998) (noting rather euphemistically that the Florida court "failed to consider" this Court's decision in *Reich v. Collins*, 513 U.S. 106 (1994)).

The ink was scarcely dry on this Court's summary disposition of *Newsweek* when the Florida courts denied the refund at issue in this case, culminating in the Florida District Court of Appeal's dismissal with a bare "*but see*" signal this Court's analogous and controlling decision in *Michigan-Wisconsin Pipe Line*. App. 11a. The problem persists in Florida, and justifies this Court's decisive intervention.

ARGUMENT

Although Petitioner will demonstrate on the merits that the Florida court erred under each of the four prongs of the *Complete Auto Transit* test, discussion of only two of those prongs is sufficient to demonstrate conflict between the

Florida decision and this Court's Commerce Clause precedents. First, the taxing scheme at issue violates the internal consistency component of the fair apportionment prong, because if the tax hypothetically were replicated in every state, impermissible multiple taxation would result. The Florida court dodged this issue by concluding summarily that because as a practical matter the exact transaction that Florida taxed *could not* reoccur in every state, there was no need to consider this test and no violation of the Commerce Clause. App. 10a. Second, the Florida court made the bald assertion that once it was established that Florida had nexus with the transaction at issue, it was not necessary to establish taxpayer nexus with Florida: "No additional taxpayer nexus requirement exists." App. 8a. Both of these errors of law are patent and should not be left to muddy the waters of this Court's carefully enunciated Commerce Clause jurisprudence. The Court should grant the writ and reverse the judgment of the District Court of Appeal of Florida, First District.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING A CREDIT MECHANISM TO ENSURE FAIR APPORTIONMENT OF TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

This Court's decision in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), involved facts that cannot be distinguished in any material way from those presented here, and reached the diametrically opposite conclusion about whether the tax at issue was fairly apportioned. This anomalous result cannot be explained by any change in the governing law, because the year after issuing its landmark Commerce Clause decision in *Complete Auto Transit*, this Court confirmed that *Michigan-Wisconsin* was still good law. *Department of Rev. v. Association of*

Washington Stevedoring Cos., 435 U.S. 734, 749 n.18 (1978) ("Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its . . . tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack."). Yet, despite TA Operating's heavy reliance on that decision, the Florida District Court of Appeal here dismissed *Michigan-Wisconsin* with no discussion, no analysis, no attempt at distinction; nothing but a "*but see*" signal,[3] as if this Court's precedents deserve no deference and afford taxpayers no protections.

In *Michigan-Wisconsin Pipe Line*, this Court invalidated a Texas tax assessed against an interstate gas pipeline company upon "gathering" natural gas from the outlet of an independent gasoline plant within the state, for immediate interstate transmission. 347 U.S. at 161. A Texas statute defined the taxable activity of "gathering gas" to mean the first taking or first retaining of possession of the gas after it passed through the outlet of the plant. *Id.* The taxpayer purchased the gas for sale in other states, but did not sell gas in Texas. *Id.* at 162. Texas law did not offer a credit for taxes paid in other states. *Id.* at 161, 164, 170 (tax was levied on entire volume of gas, in addition to all other state taxes and licenses, creating possibility that every state through which the gas subsequently passed would likewise tax the full volume).

This Court rejected the Texas court's attempt to characterize the "gathering" of gas from the plant outlet as a "local activity" not subject to repetition elsewhere. 347 U.S. at 164-65. The Court struck down the tax because it would have fostered multiple tax burdens if other states asserted an

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[3] Under Rule 1.2 of *The Bluebook: A Uniform System of Citation* (17th ed. 2000), in effect when the decision below was penned (prescribed by Fla. R. App. P. 9.800(n)), this signal indicates obvious contradiction: 'Cited authority *clearly* supports a proposition contrary to the main proposition.' *Bluebook* at 23 (emphasis added).

equal right to tax the first taking or unloading of the same gas from the pipeline when it arrived for distribution: "The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* at 170.

The Florida court's decision in *TA Operating* thus conflicts with *Michigan-Wisconsin Pipe Line* on the requirement that a tax be fairly apportioned. The Florida decision also conflicts with a very recent decision of the Court of Appeals of New York, concluding on analogous facts that the state tax violated the fair apportionment requirement by failing to provide a credit. *Tennessee Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124 (2001). The fair apportionment requirement is intended to ensure that each state taxes only its fair share of an interstate transaction and does not tax interstate activities carried on outside the state. *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989); *American Trucking Assoc. v. Scheiner*, 483 U.S. 266, 283 (1987) (fuel consumption tax used as an example of an internally consistent tax because it was apportioned based only on in-state use of the fuel). This principle derives from the dormant Commerce Clause's historical prohibition of multiple taxation, which is "threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of the value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Jefferson Lines*, 514 U.S. at 185 (citing *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250 (1938)).

Fair apportionment is measured by internal consistency and external consistency. *Goldberg*, 488 U.S. at 261. Internal consistency asks whether hypothetical application of the same tax by every state would place interstate commerce at a disadvantage compared to intrastate commerce, and thus impermissibly interfere with free trade. *Jefferson Lines*, 514 U.S. at 185; *Tyler Pipe Indus., Inc. v. Washington Dept. of*

Rev., 483 U.S. 232, 247 (1987). External consistency asks whether a state has taxed only that portion of the revenue from interstate activity that is fairly attributable to activity within the taxing state. *Id.* The internal consistency test is at issue here.

As was the case with the natural gas in *Michigan-Wisconsin Pipe Line*, it is undisputed here that all of the diesel fuel at issue was pumped directly from storage tanks at the terminal facility into the common carrier's trucks and shipped immediately out of state for resale in Georgia. App. 1a-2a. TA Operating had no personnel in Florida, operated no Florida location, made no sales in Florida, and was not licensed as a Florida dealer. *Id.* at 2a-3a. TA Operating paid Florida's excise tax on the entire volume of fuel, and then also paid Georgia's excise tax on retail sales of the entire volume of fuel. *Id.* at 2a. Florida law imposed the tax on the first sale or transfer of title in the state. Fla. Stat. § 206.87(1) (West 1993) (App. 21a). Florida's tax scheme did not offer a credit for taxes paid in other jurisdictions.

Like the Texas tax invalidated in *Michigan-Wisconsin Pipe Line*, the Florida tax at issue is invalid because it violates the internal consistency requirement. Like the Texas tax, the Florida tax here was imposed on the first sale or transfer of title to fuel in this state. Fla. Stat. § 206.87(1) (1993); App. 21a. As in *Michigan-Wisconsin Pipe Line*, the "first sale or transfer of title" to fuel could legitimately be (and in this case was) replicated in other states that had an equal right to tax the same fuel. 347 U.S. at 170. The Florida tax was imposed on the entire volume of fuel purchased just like the Texas tax. There being no valid basis to distinguish this case from *Michigan-Wisconsin Pipe Line*, the Florida court erred in dismissing it with a "*but see*" signal. The Florida tax was invalid under *Michigan-Wisconsin Pipe Line*.

Florida's special fuel tax scheme violated the central protective tenet of the Commerce Clause by unfairly

burdening interstate commerce in comparison to in-state activities. Florida's tax scheme taxed the first sale or transfer of title to fuel in the state, but allowed no credit for taxes paid on the same fuel purchased in another state. Hypothetically replicating that scheme as required under the internal consistency test, each other state would likewise tax the first sale or transfer of title to fuel in that state without allowing a credit for taxes paid in another state. The impermissible burden on interstate commerce is clear: fuel purchased in one state and sold in another would be taxed twice (once on the "first sale" in each state), while fuel purchased and subsequently sold in a single state would be taxed only once (again, only on the "first sale"). For example, a Florida taxpayer could have purchased the same diesel fuel at the same terminal, paying Florida's tax on this "first sale or transfer of title," and subsequently sold the fuel at an in-state location without incurring any additional tax liability. Because the Florida tax is imposed only at the point of "*first* sale or transfer of title," once the tax is paid at the terminal rack no further taxes are imposed on subsequent in-state dispositions of the fuel. Interstate commerce pays tax twice on two sales, while intrastate commerce pays tax once on two sales. Interstate commerce is thus placed at a disadvantage compared to intrastate commerce, and the Florida tax therefore violates the internal consistency test.

When hypothetically replicated in other states, as required under the internal consistency test of *Complete Auto Transit*, the Florida tax scheme impermissibly subjected TA Operating's purchases of fuel to multiple taxation. This specter of multiple taxation is the very evil that led to invalidation of the Texas tax in *Michigan-Wisconsin Pipe Line*. The Florida court, however, misapprehended the requisite analysis, concluding that the precise Florida taxable event at issue (initial passage of title at the terminal rack) *could not* be replicated in other states, and therefore apportionment was not required. App. 10a. This superficial analysis does not

comport with the statute. The tax was imposed on the "first sale or transfer of title," not on the "first sale or transfer of title at a terminal rack in this state." It is possible for every state to host a "first sale or transfer of title" within its jurisdiction as the fuel passes through interstate commerce. The lower court in *Michigan-Wisconsin Pipe Line* made exactly this same analytical error, which this Court rejected. 347 U.S. at 164.

Further, the Florida court completely failed to recognize this Court's requirement that the internal consistency test for fair apportionment be based on a *hypothetical* replication of the tax in every state. A reviewing court must undertake that analysis, not merely conclude that it could never happen in real life and thus need not be considered. *Jefferson Lines*, 514 U.S. at 185 ("This test asks nothing about economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."); *Tyler Pipe*, 483 U.S. at 247; *Tennessee Gas*, 96 N.Y.2d at 134 ("there is no 'as applied' escape hatch from" the hypothetical test required by the internal consistency requirement). The Florida court here erred in announcing that it was not required to apply this Court's internal consistency test, an exercise that readily would have demonstrated that Florida's taxing scheme violated the fair apportionment requirement of *Complete Auto Transit*.[4]

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[4] The Florida court also argued that Florida need not provide a credit mechanism because the Georgia tax was a 'use' tax, which, according to the Florida court, is subordinate to Florida's 'sales' tax, forcing Petitioner to look solely to Georgia for a refund. App. 10a & n.4. The Court of Appeals of New York has very recently rejected this attempted distinction for Commerce Clause purposes. *Tennessee Gas*, 96 N.Y.2d at 132-33. The Florida court's attempt to create a novel Commerce Clause distinction between sales and use taxes led the court into its erroneous conclusion

The constitutional infirmity could have been cured if Florida's taxing scheme had afforded a credit for taxes paid on the same goods in another state, but it did not. The lack of a credit in Florida's taxing scheme distinguishes this case from those in which this Court has been persuaded to uphold a tax because a credit mechanism satisfied the fair apportionment test. *See, e.g., Jefferson Lines*, 514 U.S. 192 & n.6 ("[We] have often pointed to the concomitant credit provisions for taxes paid out of state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike."); *Goldberg*, 488 U.S. at 264 ("the credit provision contained in the [t]ax [a]ct operates to avoid actual multiple taxation"). Other courts continue to recognize the requirement of a credit mechanism to ensure fair apportionment. *See, e.g., Tennessee Gas*, 96 N.Y.2d at 134 (invalidating New York tax on imported gas because it "contains no credit for taxes assessed on the purchase of gas out-of-State" and thus an impermissible double tax occurs); *General Motors Corp. v. Denver*, 990 P.2d 59, 71 (Colo. 1999) (invalidating tax lacking credit for taxes imposed by other jurisdictions). The Florida tax was not apportioned, and the lack of a credit is fatal to the tax.

The Florida District Court of Appeal opined, without citing any authority, that if TA Operating wanted a credit, it must seek one from Georgia instead. App. 10a n.4. This glib denial begs the very question of internal consistency, which asks whether the tax would be valid if Georgia and every other state refused to afford a credit just as Florida refused it. The fact that Florida's tax was imposed first on this fuel does not

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that it need not undertake the hypothetical replication of the tax for purposes of the internal consistency analysis. Further, the reasoning rested on faulty facts; even the Florida court in its own statement of the facts correctly stated that 'Georgia *sales* taxes were paid' on the fuel. App. 2a (emphasis added). Both fuel taxes were excise taxes. Fla. Stat. § 206.23 (West 1993); Ga. Code Annot. § 48-9-3 (1993).

give Florida any superior right or primacy to elevate its tax over any other state's tax. This Court in *Michigan-Wisconsin Pipe Line* invalidated the Texas tax first imposed on natural gas entering interstate commerce, because the tax infringed the right of other states to tax the same fuel on later parts of its interstate journey. 347 U.S. at 166.[5] In this additional respect, the Florida court's decision conflicts with this Court's decision in *Michigan-Wisconsin Pipe Line*. The Court has stated that it acts "as a defense against state taxes which . . . attempt to capture tax revenues that ... belong of right to other jurisdictions." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 386 (1991). Florida's imposition of an unapportioned excise tax on the full volume of diesel fuel purchased by a taxpayer with no nexus to Florida, for immediate export to and resale in Georgia, infringes on Georgia's right to capture the tax revenues from its own in-state taxpayer. TA Operating had every right to expect Florida to be the jurisdiction to refund this tax. The Court should grant the writ and reverse the judgment of the Florida District Court of Appeal.

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[5] In an isolated case, the Supreme Court of Wyoming concluded in *State v. Sinclair Pipeline Company*, 605 P.2d 377 (1980), that the Multistate Tax Compact allowed a first taxing state to claim primacy, relegating to subsequent taxing jurisdictions the obligation to provide credits. 605 P.2d at 379. *Sinclair*, however, was simply an interpretation of the Wyoming statute adopting the Multistate Tax Compact, which is not a constitutional imperative but merely an agreement between member states. *Sinclair* is thus not governing here, because Florida is not a member of the Compact. *See* Fla. Stat. § 213.15-213.18 (West 1975) (repealed by 1976 Fla. Laws ch. 76-149, § 1).

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING TAXPAYER NEXUS IN ADDITION TO TRANSACTION NEXUS FOR TAXES IN INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

As the Florida court acknowledged, TA Operating had absolutely no physical presence in Florida when it purchased this fuel: no offices, no personnel, no sales, no diesel fuel tax license. App. 2a. TA Operating merely hired a common carrier to transport the fuel to Georgia from the terminal facility in Jacksonville, Florida. *Id.* Despite TA Operating's lack of any substantial physical presence, the Florida District Court of Appeal held that nexus was satisfied because the sale (transfer of title or possession to the fuel) occurred in Florida and because, in that court's view, "no additional taxpayer nexus requirement exists." *Id.* at 8a.[6]

The Florida court's construction of the Commerce Clause as not requiring taxpayer nexus is contrary to this Court's own prior precedents clearly construing the Commerce Clause to impose just such a requirement. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) ("substantial nexus" prong of *Complete Auto Transit*). For an excise tax on the sale of goods, this Court has required that the *taxpayer* itself have a *substantial* physical presence in the taxing state. 504 U.S. at 306; *see also, National Bellas Hess, Inc. v. Illinois Dept. of Rev.*, 386 U.S. 753 (1967). The "slightest presence" of a taxpayer in the state will not satisfy the substantial nexus

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[6] The Florida court also suggested that TA Operating occupied a position analogous to that of the customers in the mail order sales cases. App. 8a. That reasoning ignores the undisputed fact that TA Operating had no presence in Florida and merely purchased the fuel for resale in Georgia, *id.* at 2a, a fact having the same legal effect as the facts upon which this Court relied in *Michigan-Wisconsin Pipe Line* to invalidate the Texas tax. 347 U.S. at 162.

requirement. *Quill*, 504 U.S. at 315 n.8. And this Court's "safe harbor" rule of *Quill* and *Bellas Hess* establishes that the use of a common carrier does *not* establish taxpayer nexus. *Quill*, 504 U.S. at 311-12; *Bellas Hess*, 386 U.S. at 758.

In *Quill*, this Court held that where a taxpayer's only physical contact with the taxing state was having a common carrier or the United States Postal Service transport the taxpayer's goods to purchasers in the state, substantial nexus over the taxpayer ***did not exist.*** 504 U.S. at 301. In that case, title to the goods transferred upon delivery to the purchaser, meaning that the seller had title to the goods while they were being transported in the taxing state. *Id.* at 302 n.1. Likewise, in the case at bar, TA Operating obtained title to the fuel as it passed into the common carrier's trucks from the terminal rack. App. 2a. The Florida court, however, concluded that passage of title to TA Operating in Florida created sufficient taxpayer nexus to justify the tax, App. 8a, even though this Court held in *Quill* that the taxpayer's holding title was *not* sufficient nexus to justify the tax. 504 U.S. at 302 & n.1. The Florida court, rather than focusing on the taxpayer, attempted to analogize TA Operating to the mail order *customers* in *National Bellas Hess* and *Quill*, who of course had nexus with the taxing state because they lived there and were receiving their mail and goods there. The Florida court missed the point of these cases that taxpayer nexus is required in addition to transaction nexus, and was flat wrong to assert that taxpayer nexus is not required under the Commerce Clause. App. 8a.

The Florida District Court's construction of the Commerce Clause as not requiring taxpayer nexus is plainly at odds with this Court's construction of the Commerce Clause. "The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504

U.S. 768, 778 (1992). The conflict between the decision of the Florida Court in *TA Operating*, and this Court's precedents in *National Bellas Hess* and *Quill*, militates strongly in favor of this Court's granting the requested writ and reversing the judgment of the Florida court.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Florida court.

Respectfully submitted,

SUSAN L. KELSEY *
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

* Counsel of Record

Counsel for Petitioner

July 26, 2001

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT.

No. 1D99-3480.
Sept. 28, 2000

TA OPERATING CORPORATION d/b/a
Truckstops of America,
Appellant,

v.

STATE of FLORIDA, DEPARTMENT of REVENUE,
Appellee.

An Appeal from the Circuit Court
for Leon County.
Terry P. Lewis, Judge.

BENTON, J.

TA Operating Corporation (TA) appeals the final summary judgment denying the refund it sought of excise taxes paid under section 206.87(1), Florida Statutes (1993), when it bought diesel fuel. We affirm, rejecting TA's contention that, because the fuel was delivered to a common carrier for export to Georgia, a Florida tax on the sale violated the Commerce Clause.

The operative facts are not in dispute.[1] A common carrier picked up diesel fuel in Jacksonville, Florida, for delivery to

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[1] TA's complaint alleged:

a. [TA] is a nationwide operator of truckstops which are retail distributors of gasoline and diesel fuel outside the State of Florida.

TA "F.O.B. Brunswick, Georgia." The parties stipulated that title to the fuel passed in Jacksonville. Amerada Hess, the Florida vendor, collected the taxes in dispute and remitted them to the Florida Department of Revenue (DOR). At the time of the sales in question (on and between March 1 and September 30, 1994) TA had no personnel in Florida, operated no Florida location, and made no sales in Florida. Georgia sales taxes were paid on subsequent resales of the fuel in Georgia.

I.

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b. Prior to December 11, 1993, the truckstops owned and operated by [TA] were owned and operated by BP Exploration and Oil Company ("BP").

c. On December 11, 1993, [TA] acquired the truckstop network assets from BP and began operating the truckstops and at the same time signed a service agreement with BP to have their tax department handle the necessary licensing of the newly acquired truckstops and to monitor the collection and payment of all taxes including taxes on gasoline and diesel fuel.

d. [TA] has no operating truckstops in Florida and therefore the need for a Florida Motor Fuel License and Florida Special Fuels License was overlooked. A Florida Motor Fuels license was applied for on March 21, 1994 . . . .

e. Special Fuel License # 10-014876 was applied for on September 9, 1994 after [TA] became aware that the Motor Fuel License did not include diesel fuel . . . .

f. A common carrier picked up the diesel fuel at Jacksonville, Florida and delivered the fuel to [TA] "F.O.B. Brunswick, Georgia." The Georgia tax was paid on the fuel.

g. On November 2, 1994, [TA] requested a refund of taxes in the amount of $981,425.16 and on December 8, 1994, [TA] requested a refund of $374,431.23. These refunds were requested pursuant to Section 206.87(3)(d), Florida Statutes, which exempts the sale of special fuel for export by licensed dealers.

h. On July 1, 1996, [Florida Department of Revenue (DOR)] denied these requests for refund . . . .

When the Florida sales took place, TA did not have a Florida license as a dealer in special fuels. As a threshold matter, DOR argues that, because TA had no Florida license as a dealer in special fuels when the taxes in dispute were paid, section 206.87(3)(d), Florida Statutes (1993), precludes TA's applying for a refund on grounds the taxes were imposed in violation of the Commerce Clause.

We agree that TA was not eligible for the exemption described in the second sentence of section 206.87(3)(d), Florida Statutes (1993), because TA did not have a Florida license as a dealer in special fuels at the time of the transactions. But we reject DOR's reading of the statute as purporting to make such licensure a precondition to rights the Commerce Clause confers.

> Special fuel is defined to include diesel fuel. § 206.86(1), Fla. Stat. (1993). Section 206.87, Florida Statutes (1993), provides:
>
> (1) An excise tax of 4 cents per gallon is hereby imposed upon every gallon of special fuel used or sold in this state for use. . . .
>
> . . .
>
> (3) The following sales are not subject to the tax herein imposed:
>
> . . .
>
> (d) *Exports of special fuel by a dealer from the state when exempted by any provision of the constitutions of the United States or the State of Florida.* The sale for export from the state of special fuel which is not exempted from the taxes imposed by this part by either the constitution of the United States or of the state shall also be exempt, but only if both the seller and the exporter of the special fuel are duly licensed as dealers of special fuel under the terms of this part.

(Emphasis supplied.) Only the second sentence of section 206.87(3)(d) contemplates persons "duly licensed as dealers."

Properly construed, the statute does not purport to make licensure a prerequisite for invoking rights under the Commerce Clause or any other constitutional provision. The term "dealer" in the first sentence of section 206.87(3)(d) necessarily means any person who deals in special fuels, without regard to whether the person holds a license. The language "duly licensed as dealers" stands in stark contrast to the unadorned word "dealer" appearing in the first sentence of section 206.87(3)(d). But for the clearly broader sense in which "dealer" is used in the immediately preceding sentence, the contrasting language in the second sentence would be redundant and—given the definition of dealer [2] in section 206.86(10)—unnecessary.

II.

TA maintains that it is entitled to a refund of the disputed taxes because their imposition runs afoul of each of four tests laid down in recent [3] "dormant Commerce Clause" cases decided by the United States Supreme Court.

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[2] Since July 1, 1996, section 206.874(1)(d), Florida Statutes (1997), has authorized unlicensed persons to export fuel. *See* Ch. 95-417, § 75, at 3485, Laws of Fla.

[3] Before the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the sale of diesel fuel to TA could have been deemed a transaction taxable by Florida despite TA's intention to export the fuel to Georgia, on the theory the fuel had come to rest in Florida and had not been committed to a common carrier when sold. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288, 69 S.Ct. 1075, 93 L.Ed. 1366 (1949) ("The circumstances which tended . . . to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation.");

Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 376-77, 43 S.Ct. 146, 67 L.Ed. 309 (1922).

Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.

State of Minnesota v. Blasius, 290 U.S. 1, 10, 54 S.Ct. 34, 78 L.Ed. 131 (1933). "Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation." *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 21, 54 S.Ct. 267, 78 L.Ed. 622 (1934). *See C.V. Floyd Fruit Co. v. Florida Citrus Comm'n*, 128 Fla. 565, 567, 571, 175 So. 248, 249, 250 (Fla.1937) (upholding an excise imposed upon citrus fruit "first handled in the primary channel of trade," defined to include "sale [or] delivery for shipment"); *see generally Amos v. Gunn*, 84 Fla. 285, 362, 94 So. 615, 640 (1922).

At one time a crucial question was whether a taxable event occurred within or without the stream of interstate commerce. *See, e.g., Federal Compress & Warehouse Co.*, 291 U.S. at 21-22, 54 S.Ct. 267 (upholding state license taxes based on the number of cotton bales compressed *per annum* even though the cotton was baled at the taxpayer's warehouse which had been designated an interstate rail carrier's depot, on grounds that "it [was] not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause").

But the United States Supreme Court no longer takes the formalistic view that the "unconditional commitment of property to a common carrier for transportation in regular course to another state or country . . . place[s] it in the stream of interstate or foreign commerce, so as to render it immune from local taxation." C.R. McCorkle, Annotation, *Property Destined for, or in Course of, Removal From State as Subject to Taxation Therein*, 11 A.L.R.2d 938 § 4 at 944 (1950). In adopting the *Complete Auto Transit* test, *see generally* 430 U.S. at 279-287, 97 S.Ct. 1076, the Court held that states may tax activity that is part of interstate commerce. The Court explained in *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 30-31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) that

> *Complete Auto* abandoned the abstract notion that interstate commerce "itself" cannot be taxed by the States. We recognized

Absent congressional approval . . . a state tax on . . . commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; *or* (4) is not fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977).

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310-11, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994). While failure to pass any one of these tests would render the special fuel tax unconstitutional, we find no merit in any of TA's arguments as to any of the four tests.

A.

As to the first test, TA posits a separate requirement of substantial nexus not only between the taxing state and the taxable activity, but also between the taxing state and the

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that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred, *see* [*McNamara v. D.H. Holmes Co., Ltd.,*] 505 So.2d[102], at 105[(La.App. 4 Cir. 3/16/87)]), but for Commerce Clause analysis it is largely irrelevant.

See also Tunica-Biloxi Tribe v. State of Louisiana, 964 F.2d 1536, 1540-41 & n. 12 (5th Cir.1992) (holding irrelevant, in relation to sales taxes on tribal automobile purchases, whether the automobiles were delivered in Louisiana or to the reservation); *Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298, 301 (Tex.1994). Whether the fuel was within or without the stream of commerce, Florida could levy the special fuel tax on the transactions at issue here.

taxpayer. In support of this contention, TA cites *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 777, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Quill Corporation v. North Dakota,* 504 U.S. 298, 306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) and *National Bellas Hess, Inc. v. Illinois Department of Revenue,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), and argues that TA's connection with Florida is too slight for Florida to tax the sale of diesel fuel TA bought.

In *Allied-Signal,* the Court decided that a state may tax its share of a nondomiciliary corporation's "unitary" income, where the corporation carries on some discrete business enterprise both inside and outside the state, but cannot tax "nonunitary" income earned by a nondomiciliary corporation in an unrelated business enterprise having no connection to the state. The Court explained that the rule that

> a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or *transaction* it seeks to tax." *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954).

Allied-Signal, 504 U.S. at 777, 112 S.Ct. 2251 (emphasis supplied). The question in *Allied-Signal* was how much income a corporate taxpayer—with unquestioned ties to the taxing state and concededly liable for state income taxes in some amount—had to pay taxes on. But the present case is very different. For one thing, it is not an income tax case. The tax at issue here is an excise on a transaction that was consummated in Florida when a Florida vendor sold diesel fuel (at rest in Florida tanks) in Florida, and relinquished possession of the fuel in Florida.

In *Complete Auto Transit, Quill Corp.* and *National Bellas Hess*, the question was whether one state could require a mail order house in another state to collect use taxes levied on mail order customers residing in the taxing state. The nexus necessary to tax the state's own residents' use was never in doubt.

TA occupies a position in the present case analogous to that of the mail order customers in *National Bellas Hess* and its progeny. *See generally Monamotor Oil Co. v. Johnson,* 292 U.S. 86, 94, 54 S.Ct. 575, 78 L.Ed. 1141 (1934) ("The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer.") Not holding a Florida license as a dealer in special fuels at the time, TA was treated as a consumer.

Amerada Hess, the licensed dealer in special fuels who, physically present in Florida, collected and remitted the taxes, occupies the position that the mail order houses occupied in *National Bellas Hess* and its progeny. *See* § 06.87(2)(a), Fla. Stat. (1993). Amerada Hess has not complained about the imposition or collection of the taxes in dispute.

TA concedes the substantial nexus Florida has with the transactions on which the contested taxes were paid. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("[A] sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49, 60 S.Ct. 388, 84 L.Ed. 565 (1940) (upholding a tax on the sale of coal where the coal was shipped by a seller outside the taxing jurisdiction). The parties stipulated that title passed in Florida. No additional taxpayer nexus requirement exists. "There is 'nexus' aplenty here." *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 33, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

B.

Contending that the tax levied by section 206.87, Florida Statutes (1993), is unfairly apportioned, TA argues that the tax fails both the internal consistency and the external consistency tests. "In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet,* 488 U.S. 252, 260- 61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989).

To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U.S., at 169[,103 S.Ct., at 2942] Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.

Id. at 261, 109 S.Ct. 582 (citing *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)). "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Jefferson Lines,* 514 U.S. at 185, 115 S.Ct. 1331.

The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Container Corp., supra,* 463 U.S., at 169-170[, 103 S.Ct., at 2942-2943] We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

Goldberg, 488 U.S. at 262, 109 S.Ct. 582. "External consistency . . . looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a state's tax

reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331.

Albeit based on volume, not price, the excise tax at issue here is a species of sales tax. As the state in which the sale occurred, Florida taxed the sale. If every state levied a similar tax on sales of special fuel, each sale would be taxed only once.[4] *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 9, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986)(finding "no threat of multiple . . . taxation . . . since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs in one national jurisdiction only."). Georgia could not impose a sales tax on this transaction. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct.

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[4] States can levy taxes on sales occurring within their borders, even though other states may impose use taxes as to the same goods. "A sales tax is a tax on the freedom of purchase. . . . A use tax is a tax on the enjoyment of that which was purchased." *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944).

Use taxes are said to be "subordinate" to sales taxes. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). As a tax on sales, the tax here has "primacy" over use taxes imposed by other states in the sense that the Legislature may assume use tax statutes provide for appropriate credits.

[I]n taxing sales [the taxing State] may rely upon use-taxing States to [provide a credit for related taxes paid elsewhere]. This is merely a practical consequence of the structure of use taxes as generally based upon the primacy of taxes on sales, in that use of goods is taxed only to the extent that their prior sale has escaped taxation. *Jefferson Lines*, 514 U.S. at 194, 115 S.Ct. 1331. The possibility that another state's use tax might result in multiple taxation, if the other state did not allow appropriate credits, does not render the initial sales tax double taxation.

Even if Georgia imposed a tax on the use of the fuel in Georgia, without allowing credit for sales taxes paid in Florida, it would be the Georgia levy, not the special fuel tax at issue here, which would violate the ban against multiple taxation.

1023, 88 L.Ed. 1304 (1944). Consequently, the tax passes the test for internal consistency.

Because the sale took place entirely in Florida, the tax also passes the test for external consistency. A sale is a discrete event which a state may tax as long as the sale takes place within its borders. *See Wardair Canada,* 477 U.S. 1 at 9, 106 S.Ct. 2369, 91 L.Ed.2d 1. The parties to a sale benefit from the amenities and laws of the place of sale, whatever the goods' ultimate origin or destination. Sales taxes can be imposed "regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Jefferson Lines,* 514 U.S. at 186, 115 S.Ct. 1331.

That title passed in Florida as the fuel was pumped in Florida made this a Florida sale. *See State Tax Comm'n v. Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 606, 83 S.Ct. 925, 10 L.Ed.2d 8 (1963) ("[A] State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State."); *Berwind-White Coal Mining Co.,* 309 U.S. at 53-54, 60 S.Ct. 388. The parties stipulated that title passed when the fuel was delivered to the common carrier. *See Chassaniol v. City of Greenwood,* 291 U.S. 584, 587, 54 S.Ct. 541, 78 L.Ed. 1004 (1934); *but see Michigan- Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 166-67, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (holding that occupational tax on the gathering of gas violated the commerce clause when the taxable event was the transfer of the gas from the seller's pipeline to the buyer's pipeline). This case involves tangible property that was physically present in Florida at the time of the sale.

C.

The special fuel tax does not discriminate against interstate commerce. All purchasers of special fuel pay the same tax. The statute draws no distinction between in-state purchasers

and out-of-state purchasers. This is not a case where a facially neutral tax discriminates against interstate commerce in fact. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 285-86, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). All purchasers of special fuel pay tax at the same rate based on the amount of fuel that changes hands. *See Goldberg*, 488 U.S. at 265-66, 109 S.Ct. 582; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). The tax burden is the same for out-of-state purchasers as for in-state purchasers.

D.

The special fuel tax is "fairly related" to services provided by Florida, including the roads over which the fuel was transported to and from the point of sale, police and fire protection, and the "other advantages of a civilized society" that made Florida a suitable place for the transaction, regardless of TA's intention to export the fuel. *See Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 474 S.E.2d 599, 610 (1996) ("It is sufficient for the fairly related test that a taxpayer receives the customary services provided by a state in response to the expectations and demands of a civilized society, such as fire and police protection, opportunities to seek emergency hospital care, food and fuel sources, a trained work force, and judicial access.").

TA makes much of the fact that the Legislature has statutorily appropriated special fuel tax revenues to pay for building and maintaining roads. But the special fuel tax remains an excise on the sale of fuel. It is not a user fee like a toll paid for the privilege of using the roads. *See American Trucking Ass'ns*, 483 U.S. at 285-86, 107 S.Ct. 2829. Florida's excise on the privilege of purchasing special fuel in Florida, *see* § 206.87(1), Fla. Stat. (1993); *Complete Auto Transit*, 430 U.S. at 287, 97 S.Ct. 1076 (upholding a tax on the privilege of doing business), does not depend for its validity on where the fuel is ultimately consumed. The taxable event is the sale, not the use, of the fuel.

"If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event." *Jefferson Lines*, 514 U.S. at 199, 115 S.Ct. 1331. *See Amos v. Gunn*, 84 Fla. 285, 363, 94 So. 615, 641 (1922)("The fact that the 1 cent a gallon sales tax increases the price paid by consumers does not render the tax invalid, even though [some] consumers use motor boats and not the public roads, to which latter the license taxes are applied."). "Taxes are not paid to the state on a quid pro quo basis." *Hartley Marine Corp.*, 474 S.E.2d at 610.

In taking advantage of the market Florida provided, TA availed itself of significant public resources. *See D.H. Holmes Co.*, 486 U.S. at 32, 108 S.Ct. 1619. Under the cases, the special fuel tax is "fairly related" to TA's purchase of diesel fuel in Florida. *See Commonwealth Edison Co.*, 453 U.S. at 626, 101 S.Ct. 2946. A "taxpayer's receipt of police and fire protection, the use of public roads . . . , and the other advantages of a civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer." *Goldberg*, 488 U.S. at 267, 109 S.Ct. 582.

III.

Finally, TA argues that the special fuel taxes Amerada Hess collected and remitted to DOR constitute excessive fines because, if TA had obtained a Florida license as a dealer in special fuel it would, as an exporter, have been exempt from tax under the second sentence of section 206.87(3)(d), Florida Statutes (1993).

We take up first the state constitutional claim. *See Traylor v. State*, 596 So.2d 957, 962-63 (Fla.1992); *State v. Stanley*, 754 So.2d 869, 872 (Fla. 1st DCA 2000). When the taxes

were collected,[5] Article I, section 17 of the Florida Constitution provided:

> Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

We have held that the state (and federal) constitutional prohibitions against excessive fines bar only payments exacted as punishment. *See Busbee v. State, Div. of Retirement*, 685 So.2d 914, 917 (Fla. 1st DCA 1996) ("The Excessive Fines provisions are only implicated if the 'fine' is a 'punishment.' ").

There is no indication in this record that the special fuel tax was imposed as a punishment. TA paid a generally applicable, revenue-raising, excise tax on a lawful activity.

> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits—such as creating employment, satisfying consumer demand, and providing tax revenues—are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising

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[5] The text remains the same today despite an intervening, ultimately unsuccessful attempt at amending it. *See Armstrong v. Harris*, 25 Fla. L. Weekly S656,—So.2d—, 2000 WL 1260014 (Fla. Sept. 7, 2000).

> purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Department of Revenue v. Kurth Ranch, 511 U.S. 767, 782, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (footnote omitted). The special fuel tax is not a fine within the meaning of the state constitution.

Cases construing the Eighth Amendment do not support TA's position, either. In *Little v. Commissioner of Internal Revenue,* 106 F.3d 1445, 1454 (9th Cir.1997), the taxpayer argued that additions to income tax for negligence, substantial understatement of tax liability and late filing were barred as excessive fines. The court rejected the argument, ruling that the additions to income tax were "purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so." *Accord Sears, Roebuck de Puerto Rico, Inc. v. Soto-Rios,* 920 F.Supp. 266, 270 (D.P.R.1996) ("Since the . . . payment is a legitimate tax, it cannot . . . be a fine."). In requiring that a taxpayer have a Florida special fuel dealer's license in order to obtain an exemption under the second sentence of section 206.87(3)(d), Florida Statutes (1993), the tax law at issue here evinced no punitive purpose. *See Pioneer Oil Co. v. State Dep't of Revenue,* 401 So.2d 1319, 1321 (Fla.1981) ("Exemptions contained in taxing statutes are special favors granted by the legislature. . . ."). Unlike *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the present case does not involve a statutory penalty. *See generally Hudson v. United States,* 522 U.S. 93, 99-102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); Laura Dietz *et al.*, 21A Am.Jur.2d *Criminal Law* § 945 (1998).

Affirmed.

ALLEN and LAWRENCE, JJ., CONCUR.

APPENDIX B

SUPREME COURT OF FLORIDA

Case No.: SC00-2276
Lower Tribunal No.: 1D99-3480

TA OPERATING CORPORATION, *et al.*,
Petitioner(s),

vs.

STATE OF FLORIDA, *et al.*,
Respondent(s).

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R App. P. 9.330(d).

SHAW, HARDING, ANSTEAD, PARIENTE and LEWIS, JJ., concur.

A True Copy Test:

/s/ Thomas D. Hall
THOMAS D. HALL
Clerk, Supreme Court

Bh
Served:
HON. BOB INZER, Clerk
HON. JON S. WHEELER, CLERK
SUSAN L. KELSEY
MARK E. HOLCOMB
CHARLIE MCCOY
CHARLES CATANZARO
HON. TERRY P. LEWIS, JUDGE

[SEAL]

APPENDIX C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA.

CASE NO: 97-2072 CIVIL DIVISION

TA OPERATING CORPORATION,
d/b/a TRUCKSTOPS OF AMERICA,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

FINAL SUMMARY JUDGMENT FOR DEFENDANT

The Plaintiff, Truckstops of America, is a nationwide operator of retail distributors of gasoline and diesel fuel. On March 21, 1994, it applied for a Florida motor fuel license, which was issued March 31, 1994. Apparently through inadvertence, the Plaintiff did not apply for a special fuel license (diesel) until sometime later, specifically October 31, 1994. Between April 1st and September 30th, 1994, the Plaintiff purchased diesel fuel from a supplier (Hess) in Jacksonville, Florida and hired a common carrier to deliver the fuel to Brunswick, Georgia.

The Plaintiff paid both Georgia and Florida taxes on the fuel purchased and delivered during this period. On November 2, 1994, and again on December 8, 1994, the Plaintiff requested a refund of taxes from the Florida Department of Revenue (DOR), based upon the tax exemption status outlined in Section 206.87(3)(d), *Florida Statutes*. The DOR denied the request and this suit followed.

The Statute in question is fairly straightforward. It requires an excise tax on every gallon of special fuel (diesel) used or sold in the State, unless otherwise exempt. Sales which are not subject to the tax include:

> "[e]xports of special fuel by a dealer from the state when exempted by any provision of the constitutions of the United States or the State of Florida. The sale for export from the state of special fuel which is not exempted from the taxes imposed by this part by either the constitution of the United States or of the state shall also be exempt, but only if both the seller and the exporter of the special fuel are duly licensed as dealers of special fuel under the terms of this part."

Section 206.87(3)(d), *Florida Statutes*.

The Plaintiff acknowledges that it did not hold a special fuel license for the period of April through September of 1994 but argues that that is unimportant since this Section provides tax exemption for the licensed and the unlicensed alike.

The Plaintiff points out that the express mention of one thing implies exclusion of the other and that thus, because the second sentence of this Section requires dealers to be "duly licensed as dealers of special fuel" in order to be eligible for the tax exemption, no license is required for exemption purposes under the first sentence because no express license requirement is included therein. This argument is unconvincing, however, in light of Section 206.02(1), *Florida Statutes*, which provides that "[i]t is unlawful for any person to engage in business as a[n] . . . exporter . . . of motor fuel within this state unless such person is the holder of an unrevoked license issued by the Department to engage in such business." Thus, a valid export cannot be made unless the company who does so holds the requisite license. It seems unlikely that the legislature intended to provide unlawful exporters with tax exemption opportunities.

The Plaintiff claims that the first sentence of Section 206.87(3)(d), *Florida Statutes*, warrants refunds for activities protected by the commerce clause. Specifically, it argues that the placement of the fuel, via a common carrier, into interstate commerce at the point of sale, protects the sale from the tax. I disagree.

The commerce clause prohibits the imposition of taxes that unduly burden interstate commerce and impede private trade in the national market place. The U.S. Supreme Court has held that a tax involving interstate commerce may be sustained where the taxed event has an nexus with the taxing jurisdiction, is fairly related to services provided by the authority imposing the tax, is fairly apportioned, and is nondiscriminatory. Florida's taxing statute meets these criteria. It creates a statutory presumption that if you purchase special fuel in the state and don't have a license for exporting it pursuant to Section 206.02, *Florida Statutes*, that the fuel is being purchased for instate use. There are valid public policy reasons for the requirement of a license and this requirement is not discriminatory as it applies to resident and nonresident purchasers alike. There is thus no violation of the commerce clause. Accordingly, it is

ORDERED AND ADJUDGED that Final Summary Judgment is entered in favor of the Defendant and against the Plaintiff and the Plaintiff shall take nothing on its claim.

DONE AND ORDERED in Chambers at Tallahassee Leon County, Florida, this 10th day of August, 1999.

/s/ Terry P. Lewis, Circuit Judge
TERRY P. LEWIS, Circuit Judge

Copies to:

CYNTHIA S. TUNNICLIFF, Esquire
Post Office Box 10095
Tallahassee, Florida 32302-209

CHARLES CATANZARO, Esquire
ASSISTANT ATTORNEY GENERAL
The Capitol - PL-01
Tallahassee, Florida 32399-1050

APPENDIX D

CONSTITUTIONAL PROVISION

U.S. Const. art. I, § 8, cl. 3:

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes .... .

STATE STATUTES

Fla. Stat. § 206.87 (West 1993):

> (1)(a) An excise tax of 4 cents per gallon is hereby imposed upon every gallon of special fuel used or sold in this state for use .... This levy of tax shall be paid upon the first sale or transfer of title within this state ....
>
> * * * *
>
> (3) The following sales are not subject to the tax herein imposed:
>
> * * * *
>
> (d) Exports of special fuel by a dealer from the state when exempted by any provision of the constitutions of the United States or the State of Florida. The sale for export from the state of special fuel which is not exempted from the taxes imposed by this part by either the constitution of the United States or of the state shall also be exempt, but only if both the seller and the exporter of the special fuel are duly licensed as dealers of special fuel under the terms of this part.

Fla. Stat. § 206.86(1), (5) (West 1993):

> (1) "Special fuel" means diesel fuel, alcohol, or any liquid product or combination thereof, except kerosene, used to propel any diesel engine; however, kerosene or kerosene compounded or mixed with any product suitable for use in a diesel engine is a "special fuel."
>
> * * * *

(5) "Use" means the placing of special fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof.

Supreme Court, U.S.
FILED
AUG 21 2001
CLERK

No. 01-160

IN THE SUPREME COURT OF THE UNITED STATES

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT A. BUTTERWORTH
Attorney General of Florida

CHARLES R. MCCOY*
CHARLES CATANZARO
Assistant Attorneys General

**Counsel of Record for Respondent*

OFFICE OF THE ATTORNEY GENERAL
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

32 pp

QUESTIONS PRESENTED

[as framed by Petitioner]

1. Does the Commerce Clause of the United States Constitution require that a state taxing the full and unapportioned value of transactions in interstate commerce provide taxpayers a credit for taxes paid on the same goods in other jurisdictions?

2. Does the Commerce Clause of the United States Constitution require a state to have nexus with the taxpayer, in addition to nexus with the transaction, in order to tax a transaction in interstate commerce?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions and statutes cited by Petitioner, this case involves the following Florida Statutes, as they existed in 1993: §206.86(10), which defined "dealer;" §206.87(3), which levied the excise tax at issue and provide exemptions; §206.89, which provided for licensing of motor fuel dealers; and §206.91, which established reporting requirements. (App. B).

STATEMENT OF THE CASE

Petitioner (TA Operating or TA) has supplied an argumentative statement which can be misleading. For example, TA declares: "Florida's taxing scheme did not provide a credit in taxes paid on the same fuel in other jurisdictions." (pet., p.4). TA ignores the fact Florida law actually went one step further: it exempted certain fuel sales from taxation in the first place, if the seller and "exporter" (here, TA) had each obtained a "special fuels" dealer license at nominal cost. *See* §206.87(3)(d) and §206.89, Florida Statutes (1993). (App. B). Rather than correcting TA Operating's statement of the case and facts, Respondent will supply its own.

Most of the central facts are set forth in the decision below. (App. A, p.1-2 & n.1). TA, a nationwide truckstop operator, purchased truckstop assets (including diesel fuel) from BP Oil and Exploration Company in December 1993. Pursuant to a concurrent service agreement between the two companies, BP was to "handle the necessary licensing." However, neither BP nor TA Operating applied for a special fuels license until TA did so in September 1994.

From April 1, 1994 through September 31, 1994, TA took delivery of 5.4 million gallons of diesel fuel, through a common carrier. By the

parties' stipulation, title to this fuel passed in Florida. The Florida vendor (Amerada Hess) collected the all the state taxes and remitted them to Respondent, the Florida Department of Revenue (Department or DOR).

The fuel was delivered to TA, "F.O.B. Brunswick, Georgia." Georgia tax was paid on the fuel when it was re-sold. During this time, TA had no personnel or operations in Florida, and made no sales in Florida.

In November 1994, TA requested two refunds of Florida taxes paid on the fuel, together equaling about $1.36 million. The Department denied the refunds.

This litigation ensued. DOR agrees TA Operating timely filed the instant petition.

REASONS FOR DENYING THE WRIT

I. THE UNDISPUTED FACTS MAKE IT UNNECESSARY TO REACH EITHER QUESTION PRESENTED.

The disputed taxes were collected on sales of diesel fuel which took place entirely in Florida, where title to the fuel passed. The court below properly recognized the sales were discrete taxable events. It then noted the TA Operating could have obtained a "special fuels license" under §206.87(3) & 206.89, Florida Statutes (1993), and been exempt from the taxes.

In essence, this entire lawsuit is an attempt to compel Florida to compensate TA for its or BP's failure to timely procure a special fuels license, which would have issued as a matter of routine. If the disputed taxes somehow were an undue burden on interstate commerce, that burden could and should have been readily alleviated by TA. In fact, any burden was eliminated when TA applied for a special fuels license in September 1994. *Cf.* Barclays Bank PLC v. Franchise Tax Bd. of California, 114 S.Ct. 2268, 2278 (1994)

(upholding California's worldwide combined income reporting statute, in part because the statute allowed a taxpayer to use "reasonable approximations" to calculate the amount of taxable income under certain circumstances).

Absolutely nothing in this Court's jurisprudence relieves an entity engaged in interstate commerce from compliance with a minimal mechanism--obtaining a $5.00 license--that is part of statutory provisions for monitoring disposal of untaxed fuel.[1] The Commerce Clause does not command Florida to abandon licensing and reporting requirements, thereby risking widespread abuse of the exemption through diversion of untaxed fuel into the Florida market.

There is no justification for reviewing this case on the merits. TA simply failed to avail itself of an exemption from Florida taxes. The exemption was equally available to non-Florida dealers, as illustrated by the fact TA applied for a special fuels license in September 1994; and received such license on October 31, 1994.[2]

Under Rule 10(c), the decision to grant certiorari considers whether the state court has decided a question of federal law which is important, and which should be settled by this Court; or is important and conflicts with relevant decisions of this Court. The questions presented by TA's petition do not meet these criteria.

The first question is not important because it assumes the sales of fuel to TA's carrier were "in interstate commerce." This assumption is not correct. Absent proper licensing, the transactions were, legally, in-state retail sales. It was not Florida's duty to anticipate TA's undeclared intent to deliver the fuel to Georgia for re-sale. Under the same reasoning, the first question does not raise a Commerce Clause issue, or conflict with this Court's Commerce Clause cases. TA's

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[1]Section 206.89(4), Fla. Stat. (1993), provided a license applicant must pay a fee of $5.00, "at the time of filing." Section 206.91, Fla. Stat. (1993), required dealers to make monthly reports to DOR, showing "nontaxable disposals" of diesel fuel, etc.

[2]In its motion for summary judgment, TA admitted receiving the special fuels license.

failure to obtain a special fuel dealer's license removed its purchase of fuel, completed entirely within Florida, from interstate commerce.

The second question is similarly unimportant. By not having a special fuels dealer's license, TA was indistinguishable from any retail purchaser of diesel fuel. Whether the Commerce Clause requires substantial connection to the taxpayer as well as the transaction has no bearing on this case. TA completed it s transaction, and took title and possession of its goods (fuel) in Florida. TA was, in effect, a retail purchaser in a sale completed entirely within Florida, where title to the fuel passed.

TA Operating simply refuses to acknowledge that obtaining a special fuels license was part of the regulatory mechanism by which Florida prevented abuse of the tax exemption. Absent the license, only TA's undeclared intent to deliver the fuel elsewhere implicated the Commerce Clause. Nothing in Commerce Clause jurisprudence forbids taxation of sales completed within Florida, just because the buyer silently contemplates delivering the goods to another state for re-sale; when, as here, state law provides a reasonable mechanism to avoid paying the tax.

The Commerce Clause does not grant absolution from unexcused failure to comply with minimal state regulatory mechanisms. Whatever TA's remedies against BP under the service contract, TA cannot obtain relief against Florida via the Commerce Clause. The facts make it unnecessary to reach either question presented.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THIS COURT'S COMMERCE CLAUSE CASES.

A. No Conflict with Cases Requiring Apportionment of Taxes

By stipulation, title to the fuel passed in Florida, where TA accepted numerous deliveries. Under these facts, DOR can speak no better than the court below:

> Albeit based on volume, not price, the excise tax at issue here is a species of sales tax. As the state in which the sale occurred, Florida taxed the sale. If every state levied a similar tax on sales of special fuel, each sale would be taxed only once.

(App. A, p.9). Because the entire sale took place in Florida, there was nothing to apportion. *See* Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S.Ct. 1331, 1339 (1995) ("We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future."); State Tax Commission of Utah v. Pacific State Cast Iron Pipe Co., 372 U.S. 605, 83 S.Ct. 925, 926 (1963)("[A] State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State.").

Nevertheless, TA claims conflict between the decision below and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S.Ct. 396 (1954). There, a Texas statute taxed natural gas moving by pipeline from Texas to other states. The taxable event was the "gathering" of gas, broadly defined by statute to include the uninterrupted flow gas from the independent producer's pipelines to the distributor' s pipelines *Id.*, 74 S.Ct. at 398-99.

The distributor--who held a federal certificate for interstate transport and sale of natural gas (*id.* at 398)--did no business in Texas. The gas moved within a pipeline, and could not enter the Texas market. The gas was purchased under a "long-term contract" (*id.* at 399), not necessarily mandating passage of title in Texas. Texas law did not provide an exemption from taxation.

Here, title passed in Florida. Florida law did more than provide a refund. It provided an up-front exemption from the tax, requiring only that a dealer obtain a routine, special fuels license at very minimal expense.

In Michigan-Wisconsin Pipe Line, the "problem" was whether Texas had "delayed the incidence of the tax" (*id.* at 401) until interstate commerce has begun. Here, the tax accrued at the point of sale, when the fuel left the "rack" and entered a physically distinct mode of transport (tank truck). At that point, interstate commerce had not necessarily begun. Only TA's undeclared intent distinguished its fuel from a load intended for delivery in Florida. Moreover, no law prevented TA from selling the fuel to a Florida distributor on short notice, at least if TA collected taxes due.

TA paid Florida tax on the "entire volume of fuel," and then paid Georgia tax on retail sales of the same volume. (petition. p.11). TA thereby admits to a one-time "bulk" sale with title passing in Florida; or, at least, a series of sales upon the loading of each truck there. Either alternative was followed by vastly more retail sales in Georgia--enough to account for the 5.4 million gallons subject to the disputed taxes. This is not re-taxing of the same event by different states.

Florida law provided ready relief from state taxes. All TA had to do was procure a special fuels dealer's license. It readily did so once it discovered its failure. The license was part of the regulatory mechanism for tracking untaxed fuel, to prevent its diversion and untaxed sale in the Florida market. TA does not claim otherwise, and fails to advance any authority that such minimal licensure violates the Commerce Clause.

B. No Conflict with Cases Requiring Nexus Between the Taxpayer and the Taxing State

Echoing its first point, DOR notes that TA Operating arranged for a common carrier to pick up its diesel fuel in Florida, where title to the fuel passed. TA ignores the obvious. It took many trips, spread over six months, to transport the 5.4 million gallons of diesel fuel to Georgia. TA was present in Florida each time one of the carrier's trucks was loaded, just as if TA had sent its own trucks to pick up the fuel. *See* Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (upholding a Florida use tax when independent contractors did all of the seller's in-state solicitation, and seller had no other presence in the state).

Because TA's second question is premised on TA's alleged lack of connection with Florida, and such premise has no factual support, the Court need go no further to reject the question. Each time fuel was pumped into the carrier's trucks, in Jacksonville, TA was physically present in Florida.

TA's second question also turns caselaw regarding tax exemptions on its head. By seeking a refund, TA sought the benefit of an exemption from Florida's various taxes on diesel fuel, including the excise tax levied on "every gallon of special fuel used or sold in this state." §206.87(1), Florida Statues (1993). To obtain the refund, TA was required to show it had timely met the conditions--not separately attacked as unduly burdensome--for exemption,[3] including a license.

The unspoken gist of TA's position is that the dormant Commerce Clause creates a broad exemption, not just from state taxes, but also from minimal licensing requirements necessary to prevent abuse of an express exemption in state law. Such logic flies in the face of caselaw holding exemptions are narrowly construed:

> We are guided to a restrictive interpretation of §1146(c)'s reach by the Supreme Court's holding in California State Board of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 109 S.Ct. 2228, 104 L.Ed.2d 910 (1989), which stated that "[a]lthough Congress can confer an immunity from state taxation, ... a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *Id.* at 851-52, 109 S.Ct. 2228 (citations and internal quotation marks omitted). This passage clearly indicates that tax exemptions should be construed narrowly in favor of the state. It follows that we cannot allow private parties, who would fervently pursue every possible tax advantage, to interpret and extend statutory tax exemptions ....

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[3]The exemptions are set forth in sec. 206.87(3).

In re NVR, LP, 189 F.3d 442, 457 (4th Cir. 1999), *cert. den.*, 120 S.Ct. 936 (2000).

While the Commerce Clause is not a statute, the logic of NVR is persuasive here. TA relies on the "dormant" Commerce Clause. In effect, it urges the Commerce Clause exempts every sale from state taxation, based on the buyer's undeclared intent to place the purchased goods in the stream of interstate commerce; and despite the buyer's failure to comply with a reasonable and inexpensive condition to be exempt from taxation. TA's position loses sight of the purpose of the Commerce Clause--to prevent undue burdens on commerce, not to override reasonable conditions for exemption from state taxes.

"[T]he burden is on the taxpayer seeking exemption to demonstrate that it is in fact entitled to tax-exempt status ...." Fund for the Study of Economic Growth and Tax Reform v. I.R.S., 161 F.3d 755, 759 (D.C. Cir. 1998) [cite omitted]. TA's proposed question reverses this principle. It would require Florida to prove TA--at the time of the transactions--was not entitled to the exemption.

There is no conflict between the decision below and Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992); a contemporary application of National Bellas Hess, Inc. v. Illinois Dept. of Revenue, 386 U.S. 753, 87 S.Ct. 1389 (1967). Quill, a nationwide seller of office equipment and supplies, solicited business in North Dakota through flyers, etc. It had no employees, property or other presence in that state. All purchases in North Dakota were delivered by mail or common carrier from out-of-state locations. *Id.* at 1907-8. Under these facts, the Court held application of North Dakota's use tax violated the Commerce Clause.

TA Operating, however, had significantly more contact with Florida than Quill had with North Dakota. Unlike Quill, TA did not merely deliver goods to Floridians by mail or common carrier. Instead, TA purchased 5.4 million gallons of fuel, with title passing in Florida; took physical delivery via carrier in Jacksonville; and had the fuel transported to Georgia for re-sale. Because TA did so without obtaining a license to be treated as a "dealer" in special fuels, it was legally no different from any other retail buyer. In effect, TA was the

customer, having completing a discrete retail sale entirely in Florida; with the goods incrementally delivered each time the carrier accepted a load of fuel on TA's behalf. There is no conflict between the decision below and Quill.

For the same reasons, there is no conflict between the decision below and Bellas Hess. There, National Bellas Hess, a mail order house had its principal place of business in Missouri. It had no outlets, sales representatives, or property in Illinois. It did no advertising there. Bellas Hess' only contact with Illinois was through mail or common carrier--for the mailing of catalogues and flyers, and the delivery of merchandise. Still, Illinois required Bellas Hess to collect and remit state use taxes. *Id.*, 87 S.Ct. at 1390.

As just noted, the facts are different here. TA's presence in Florida was far more than delivery of merchandise by common carrier or mail.

This leads directly to DOR's unifying theme. TA was present in Florida, and could have obtained an exemption from taxation, unlike the taxpayers in Quill and Bellas Hess. The exemption was available through a simple and inexpensive license, which TA did later obtain. The license facilitated the tracking of exempt fuel, so that it could not be diverted into Florida and sold at a greater profit (the avoided taxes). Nothing of the sort was mentioned in Quill and Bellas Hess.

CONCLUSION

TA Operating's petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CHARLES R. MCCOY*
Florida Bar No. 3336346
CHARLES CATANZARO
Florida Bar No. 979732
Assistant Attorneys General
*Counsel of Record for Respondent**

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 488-4872 (fax)

August 16, 2001

TABLE OF APPENDICES

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A	Opinion Below	09/28/2000
B	Ch. 206, Fla. Stat., 1993 (excerpts)	N/A

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA,
FIRST DISTRICT.

TA OPERATING CORPORATION d/b/a
Truckstops of America,
Appellant,

v.

STATE of Florida, DEPARTMENT OF REVENUE,
Appellee.

No. 1D99-3480.
Sept. 28, 2000.

An appeal from the Circuit Court for Leon County.
Terry P. Lewis, Judge.

BENTON, J.

TA Operating Corporation (TA) appeals the final summary judgment denying the refund it sought of excise taxes paid under section 206.87(1), Florida Statutes (1993), when it bought diesel fuel. We affirm, rejecting TA's contention that, because the fuel was delivered to a common carrier for export to Georgia, a Florida tax on the sale violated the Commerce Clause.

The operative facts are not in dispute.[1] A common carrier picked

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[1] TA's complaint alleged:

a. [TA] is a nationwide operator of truckstops which are retail distributors of gasoline and diesel fuel outside the State of Florida.
b. Prior to December 11, 1993, the truckstops owned and operated by [TA] were owned and operated by BP Exploration and Oil Company ("BP").

c. On December 11, 1993, [TA] acquired the truckstop network assets from BP and began operating the truckstops and at the same time signed a service agreement with BP to have their tax department handle the necessary licensing

up diesel fuel in Jacksonville, Florida, for delivery to TA "F.O.B. Brunswick, Georgia." The parties stipulated that title to the fuel passed in Jacksonville. Amerada Hess, the Florida vendor, collected the taxes in dispute and remitted them to the Florida Department of Revenue (DOR). At the time of the sales in question (on and between March 1 and September 30, 1994) TA had no personnel in Florida, operated no Florida location, and made no sales in Florida. Georgia sales taxes were paid on subsequent resales of the fuel in Georgia.

I.

When the Florida sales took place, TA did not have a Florida license as a dealer in special fuels. As a threshold matter, DOR argues that, because TA had no Florida license as a dealer in special fuels when the taxes in dispute were paid, section 206.87(3)(d), Florida Statutes (1993), precludes TA's applying for a refund on grounds the taxes were imposed in violation of the Commerce Clause.

We agree that TA was not eligible for the exemption described

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of the newly acquired truckstops and to monitor the collection and payment of all taxes including taxes on gasoline and diesel fuel.

d. [TA] has no operating truckstops in Florida and therefore the need for a Florida Motor Fuel License and Florida Special Fuels License was overlooked. A Florida Motor Fuels license was applied for on March 21, 1994....

e. Special Fuel License # 10-014876 was applied for on September 9, 1994 after [TA] became aware that the Motor Fuel License did not include diesel fuel....

f. A common carrier picked up the diesel fuel at Jacksonville, Florida and delivered the fuel to [TA] "F.O.B. Brunswick, Georgia." The Georgia tax was paid on the fuel.

g. On November 2, 1994, [TA] requested a refund of taxes in the amount of $981,425.16 and on December 8, 1994, [TA] requested a refund of $374,431.23. These refunds were requested pursuant to > Section 206.87(3)(d), Florida Statutes, which exempts the sale of special fuel for export by licensed dealers.

h. On July 1, 1996, [Florida Department of Revenue (DOR)] denied these requests for refund....

in the second sentence of section 206.87(3)(d), Florida Statutes (1993), because TA did not have a Florida license as a dealer in special fuels at the time of the transactions. But we reject DOR's reading of the statute as purporting to make such licensure a precondition to rights the Commerce Clause confers.

Special fuel is defined to include diesel fuel. §206.86(1), Fla. Stat. (1993). Section 206.87, Florida Statutes (1993), provides:

> (1) An excise tax of 4 cents per gallon is hereby imposed upon every gallon of special fuel used or sold in this state for use....
>
> ...
>
> (3) The following sales are not subject to the tax herein imposed:
>
> ...
>
> (d) Exports of special fuel by a dealer from the state when exempted by any provision of the constitutions of the United States or the State of Florida. The sale for export from the state of special fuel which is not exempted from the taxes imposed by this part by either the constitution of the United States or of the state shall also be exempt, but only if both the seller and the exporter of the special fuel are duly licensed as dealers of special fuel under the terms of this part.

(Emphasis supplied.) Only the second sentence of section 206.87(3)(d) contemplates persons "duly licensed as dealers."

Properly construed, the statute does not purport to make licensure a prerequisite for invoking rights under the Commerce Clause or any other constitutional provision. The term "dealer" in the first sentence of section 206.87(3)(d) necessarily means any person who deals in special fuels, without regard to whether the person holds a license. The language "duly licensed as dealers" stands in stark

contrast to the unadorned word "dealer" appearing in the first sentence of section 206.87(3)(d). But for the clearly broader sense in which "dealer" is used in the immediately preceding sentence, the contrasting language in the second sentence would be redundant and--given the definition of dealer[2] in section 206.86(10)--unnecessary.

II.

TA maintains that it is entitled to a refund of the disputed taxes because their imposition runs afoul of each of four tests laid down in recent[3] "dormant Commerce Clause"cases decided by the United

---

[2] Since July 1, 1996, section 206.874(1)(d), Florida Statutes (1997), has authorized unlicensed persons to export fuel. *See* Ch. 95-417, § 75, at 3485, Laws of Fla.

[3]Before the decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the sale of diesel fuel to TA could have been deemed a transaction taxable by Florida despite TA's intention to export the fuel to Georgia, on the theory the fuel had come to rest in Florida and had not been committed to a common carrier when sold. *See* Kosydar v. National Cash Register Co., 417 U.S. 62, 70, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); Joy Oil Co. v. State Tax Comm'n, 337 U.S. 286, 288, 69 S.Ct. 1075, 93 L.Ed. 1366 (1949) ("The circumstances which tended ... to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation."); Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366, 376-77, 43 S.Ct. 146, 67 L.Ed. 309 (1922).

> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.

State of Minnesota v. Blasius, 290 U.S. 1, 10, 54 S.Ct. 34, 78 L.Ed. 131 (1933). "Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation." Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 21, 54 S.Ct. 267, 78 L.Ed. 622 (1934). *See* C.V. Floyd Fruit Co. v. Florida Citrus Comm'n, 128 Fla. 565, 567, 571, 175 So. 248, 249, 250 (Fla.1937) (upholding an excise imposed upon citrus fruit "first handled in the primary channel of trade," defined to include "sale [or] delivery for shipment"); *see generally* Amos v. Gunn, 84 Fla. 285, 362, 94 So. 615, 640 (1922).

States Supreme Court.

At one time a crucial question was whether a taxable event occurred within or without the stream of interstate commerce. *See, e.g.*, Federal Compress & Warehouse Co., 291 U.S. at 21-22, 54 S.Ct. 267 (upholding state license taxes based on the number of cotton bales compressed per annum even though the cotton was baled at the taxpayer's warehouse which had been designated an interstate rail carrier's depot, on grounds that "it [was] not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause").

But the United States Supreme Court no longer takes the formalistic view that the "unconditional commitment of property to a common carrier for transportation in regular course to another state or country ... place[s] it in the stream of interstate or foreign commerce, so as to render it immune from local taxation." C.R. McCorkle, Annotation, *Property Destined for, or in Course of, Removal From State as Subject to Taxation Therein*, 11 A.L.R.2d 938 §4 at 944 (1950). In adopting the Complete Auto Transit test, *see generally* 430 U.S. at 279-287, 97 S.Ct. 1076, the Court held that states may tax activity that is part of interstate commerce. The Court explained in D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24, 30-31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) that

> Complete Auto abandoned the abstract notion that interstate commerce "itself" cannot be taxed by the States. We recognized that, with certain restrictions, interstate commerce may be required to pay its fair share of state taxes. Accordingly, in the present case, it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred, see [McNamara v. D.H. Holmes Co., Ltd.,] 505 So.2d[102], at 105[(La.App. 4 Cir. 3/16/87)]), but for Commerce Clause analysis it is largely irrelevant.

See also Tunica-Biloxi Tribe v. State of Louisiana, 964 F.2d 1536, 1540-41 & n. 12 (5th Cir.1992) (holding irrelevant, in relation to sales taxes on tribal automobile purchases, whether the automobiles were delivered in Louisiana or to the reservation); Diamond Shamrock Refining and Marketing Co. v. Nueces County Appraisal Dist., 876 S.W.2d 298, 301 (Tex.1994). Whether the fuel was within or without the stream of commerce, Florida could levy the special fuel tax on the transactions at issue here.

> Absent congressional approval ... a state tax on ... commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977).

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310-11, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994). While failure to pass any one of these tests would render the special fuel tax unconstitutional, we find no merit in any of TA's arguments as to any of the four tests.

A.

As to the first test, TA posits a separate requirement of substantial nexus not only between the taxing state and the taxable activity, but also between the taxing state and the taxpayer. In support of this contention, TA cites Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768, 777, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); Quill Corporation v. North Dakota, 504 U.S. 298, 306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) and National Bellas Hess, Inc. v. Illinois Department of Revenue, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), and argues that TA's connection with Florida is too slight for Florida to tax the sale of diesel fuel TA bought.

In Allied-Signal, the Court decided that a state may tax its share of a nondomiciliary corporation's "unitary" income, where the corporation carries on some discrete business enterprise both inside and outside the state, but cannot tax "nonunitary" income earned by a nondomiciliary corporation in an unrelated business enterprise having no connection to the state. The Court explained that the rule that

> a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954).

Allied-Signal, 504 U.S. at 777, 112 S.Ct. 2251 (emphasis supplied). The question in Allied-Signal was how much income a corporate taxpayer--with unquestioned ties to the taxing state and concededly liable for state income taxes in some amount--had to pay taxes on. But the present case is very different. For one thing, it is not an income tax case. The tax at issue here is an excise on a transaction that was consummated in Florida when a Florida vendor sold diesel fuel (at rest in Florida tanks) in Florida, and relinquished possession of the fuel in Florida.

In Complete Auto Transit, Quill Corp. and National Bellas Hess, the question was whether one state could require a mail order house in another state to collect use taxes levied on mail order customers residing in the taxing state. The nexus necessary to tax the state's own residents' use was never in doubt.

TA occupies a position in the present case analogous to that of the mail order customers in National Bellas Hess and its progeny. *See generally* Monamotor Oil Co. v. Johnson, 292 U.S. 86, 94, 54 S.Ct. 575, 78 L.Ed. 1141 (1934) ("The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer.") Not holding a Florida license as a dealer in special fuels at the time, TA was treated as a consumer.

Amerada Hess, the licensed dealer in special fuels who, physically present in Florida, collected and remitted the taxes, occupies the position that the mail order houses occupied in National Bellas Hess and its progeny. *See* §206.87(2)(a), Fla. Stat. (1993). Amerada Hess has not complained about the imposition or collection of the taxes in dispute.

TA concedes the substantial nexus Florida has with the transactions on which the contested taxes were paid. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("[A] sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 49, 60 S.Ct. 388, 84 L.Ed. 565 (1940) (upholding a tax on the sale of coal where the coal was shipped by a seller outside the taxing jurisdiction). The parties stipulated that title passed in Florida. No additional taxpayer nexus requirement exists. "There is 'nexus' aplenty here." D.H. Holmes Co. v. McNamara, 486 U.S. 24, 33, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

B.

Contending that the tax levied by section 206.87, Florida Statutes (1993), is unfairly apportioned, TA argues that the tax fails both the internal consistency and the external consistency tests. "In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." Goldberg v. Sweet, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989).

To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U.S., at 169[,103 S.Ct., at 2942] Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.

Id. at 261, 109 S.Ct. 582 (*citing* Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)). "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331.

The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. Container Corp., *supra*, 463 U.S., at 169-170[, 103 S.Ct., at 2942-2943] We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

Goldberg, 488 U.S. at 262, 109 S.Ct. 582. "External consistency ... looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331.

Albeit based on volume, not price, the excise tax at issue here is a species of sales tax. As the state in which the sale occurred, Florida taxed the sale. If every state levied a similar tax on sales of special fuel, each sale would be taxed only once.[4] *See* Wardair Canada, Inc.

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[4] States can levy taxes on sales occurring within their borders, even though other states may impose use taxes as to the same goods. "A sales tax is a tax on the freedom of purchase.... A use tax is a tax on the enjoyment of that which was purchased." *See* McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944).

Use taxes are said to be "subordinate" to sales taxes. *See* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). As a tax on sales, the tax here has "primacy" over use taxes imposed by other states in the sense that the Legislature may assume use tax statutes provide for appropriate credits.

[I]n taxing sales [the taxing State] may rely upon use-taxing States to [provide a credit for related taxes paid elsewhere]. This is merely a practical consequence of the structure of use taxes as generally based upon the primacy of taxes on sales, in that use of goods is taxed only to the extent that their prior sale has escaped taxation.

Jefferson Lines, 514 U.S. at 194, 115 S.Ct. 1331. The possibility that another state's use tax might result in multiple taxation, if the other state did not allow appropriate credits, does not render the initial sales tax double taxation.

v. Florida Dep't of Revenue, 477 U.S. 1, 9, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986)(finding "no threat of multiple ... taxation ... since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs in one national jurisdiction only."). Georgia could not impose a sales tax on this transaction. *See* McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944). Consequently, the tax passes the test for internal consistency.

Because the sale took place entirely in Florida, the tax also passes the test for external consistency. A sale is a discrete event which a state may tax as long as the sale takes place within its borders. *See* Wardair Canada, 477 U.S. 1 at 9, 106 S.Ct. 2369, 91 L.Ed.2d 1. The parties to a sale benefit from the amenities and laws of the place of sale, whatever the goods' ultimate origin or destination. Sales taxes can be imposed "regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." Jefferson Lines, 514 U.S. at 186, 115 S.Ct. 1331.

That title passed in Florida as the fuel was pumped in Florida made this a Florida sale. *See* State Tax Comm'n v. Pacific States Cast Iron Pipe Co., 372 U.S. 605, 606, 83 S.Ct. 925, 10 L.Ed.2d 8 (1963) ("[A] State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State."); Berwind-White Coal Mining Co., 309 U.S. at 53-54, 60 S.Ct. 388. The parties stipulated that title passed when the fuel was delivered to the common carrier. *See* Chassaniol v. City of Greenwood, 291 U.S. 584, 587, 54 S.Ct. 541, 78 L.Ed. 1004 (1934); *but see* Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-67, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (holding that occupational tax on the gathering of gas violated the commerce clause when the taxable event was the transfer of the gas from the seller's pipeline to the buyer's pipeline). This case involves tangible property that was physically present in Florida at the time of the sale.

Even if Georgia imposed a tax on the use of the fuel in Georgia, without allowing credit for sales taxes paid in Florida, it would be the Georgia levy, not the special fuel tax at issue here, which would violate the ban against multiple taxation.

C.

The special fuel tax does not discriminate against interstate commerce. All purchasers of special fuel pay the same tax. The statute draws no distinction between in-state purchasers and out-of-state purchasers. This is not a case where a facially neutral tax discriminates against interstate commerce in fact. *See* American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 285-86, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). All purchasers of special fuel pay tax at the same rate based on the amount of fuel that changes hands. *See* Goldberg, 488 U.S. at 265-66, 109 S.Ct. 582; Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). The tax burden is the same for out-of-state purchasers as for in-state purchasers.

D.

The special fuel tax is "fairly related" to services provided by Florida, including the roads over which the fuel was transported to and from the point of sale, police and fire protection, and the "other advantages of a civilized society" that made Florida a suitable place for the transaction, regardless of TA's intention to export the fuel. *See* Hartley Marine Corp. v. Mierke, 196 W.Va. 669, 474 S.E.2d 599, 610 (1996) ("It is sufficient for the fairly related test that a taxpayer receives the customary services provided by a state in response to the expectations and demands of a civilized society, such as fire and police protection, opportunities to seek emergency hospital care, food and fuel sources, a trained work force, and judicial access.").

TA makes much of the fact that the Legislature has statutorily appropriated special fuel tax revenues to pay for building and maintaining roads. But the special fuel tax remains an excise on the sale of fuel. It is not a user fee like a toll paid for the privilege of using the roads. *See* American Trucking Ass'ns, 483 U.S. at 285-86, 107 S.Ct. 2829. Florida's excise on the privilege of purchasing special fuel in Florida, *see* §206.87(1), Fla. Stat. (1993); Complete Auto Transit, 430 U.S. at 287, 97 S.Ct. 1076 (upholding a tax on the privilege of doing business), does not depend for its validity on where the fuel is ultimately consumed. The taxable event is the sale, not the use, of the fuel.

"If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event." Jefferson Lines, 514 U.S. at 199, 115 S.Ct. 1331. *See* Amos v. Gunn, 84 Fla. 285, 363, 94 So. 615, 641 (1922)("The fact that the 1 cent a gallon sales tax increases the price paid by consumers does not render the tax invalid, even though [some] consumers use motor boats and not the public roads, to which latter the license taxes are applied."). "Taxes are not paid to the state on a quid pro quo basis." Hartley Marine Corp., 474 S.E.2d at 610.

In taking advantage of the market Florida provided, TA availed itself of significant public resources. *See* D.H. Holmes Co., 486 U.S. at 32, 108 S.Ct. 1619. Under the cases, the special fuel tax is "fairly related" to TA's purchase of diesel fuel in Florida. *See* Commonwealth Edison Co., 453 U.S. at 626, 101 S.Ct. 2946. A "taxpayer's receipt of police and fire protection, the use of public roads ..., and the other advantages of a civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer." Goldberg, 488 U.S. at 267, 109 S.Ct. 582.

III.

Finally, TA argues that the special fuel taxes Amerada Hess collected and remitted to DOR constitute excessive fines because, if TA had obtained a Florida license as a dealer in special fuel it would, as an exporter, have been exempt from tax under the second sentence of section 206.87(3)(d), Florida Statutes (1993).

We take up first the state constitutional claim. *See* Traylor v. State, 596 So.2d 957, 962-63 (Fla.1992); State v. Stanley, 754 So.2d 869, 872 (Fla. 1st DCA 2000). When the taxes were collected,[5] Article I, section 17 of the Florida Constitution provided:

> Excessive fines, cruel or unusual punishment,

---

[5] The text remains the same today despite an intervening, ultimately unsuccessful attempt at amending it. *See* Armstrong v. Harris, 25 Fla. L. Weekly S656, --- So.2d ----, 2000 WL 1260014 (Fla. Sept. 7, 2000).

> attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

We have held that the state (and federal) constitutional prohibitions against excessive fines bar only payments exacted as punishment. *See* Busbee v. State, Div. of Retirement, 685 So.2d 914, 917 (Fla. 1st DCA 1996) ("The Excessive Fines provisions are only implicated if the 'fine' is a 'punishment.' ").

There is no indication in this record that the special fuel tax was imposed as a punishment. TA paid a generally applicable, revenue-raising, excise tax on a lawful activity.

> Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits--such as creating employment, satisfying consumer demand, and providing tax revenues--are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.

Department of Revenue v. Kurth Ranch, 511 U.S. 767, 782, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) (footnote omitted). The special fuel tax is not a fine within the meaning of the state constitution.

Cases construing the Eighth Amendment do not support TA's

position, either. In Little v. Commissioner of Internal Revenue, 106 F.3d 1445, 1454 (9th Cir.1997), the taxpayer argued that additions to income tax for negligence, substantial understatement of tax liability and late filing were barred as excessive fines. The court rejected the argument, ruling that the additions to income tax were "purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so." *Accord* Sears, Roebuck de Puerto Rico, Inc. v. Soto-Rios, 920 F.Supp. 266, 270 (D.P.R.1996) ("Since the ... payment is a legitimate tax, it cannot ... be a fine."). In requiring that a taxpayer have a Florida special fuel dealer's license in order to obtain an exemption under the seco sentence of section 206.87(3)(d), Florida Statutes (1993), the tax law at issue here evinced no punitive purpose. *See* Pioneer Oil Co. v. State Dep't of Revenue, 401 So.2d 1319, 1321 (Fla.1981) ("Exemptions contained in taxing statutes are special favors granted by the legislature...."). Unlike United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the present case does not involve a statutory penalty. *See generally* Hudson v. United States, 522 U.S. 93, 99-102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); Laura Dietz *et al.*, 21A Am.Jur.2d Criminal Law §945 (1998).

Affirmed.

ALLEN and LAWRENCE, JJ., CONCUR.

APPENDIX B

Chapter 206, Florida Statutes (1993) [*excerpts*]

206.86. Definitions

As used in this part:

* * *

(10) "Dealer" is any person who holds a valid dealer of special fuels license issued by the department and who:

* * *

(g) Purchases or receives in this state special fuels in bulk quantities for resale to service stations, to a user or another dealer, or to the ultimate consumer upon which the tax has not been paid; or

(h) Has both a taxable use and nontaxable consumption of the same special fuel in this state. However, this paragraph does not require a person to be a dealer when his only purchases of special fuel are delivered into reservoirs attached to motor vehicles to fuel internal combustion engines attached to such motor vehicles.

206.87. Levy of tax

* * *

(3) The following sales are not subject to the tax herein imposed:

* * *

(d) Exports of special fuel by a dealer from the state when exempted by any provision of the constitutions of the United States or the State of Florida. The sale for export from the state of special fuel which is not exempted from the taxes imposed by this part by either the constitution of the United States or of the state shall also be exempt, but only if both the seller and the exporter of the special fuel are duly licensed as dealers of special fuel under the terms of this part.

206.89. Licenses; necessity; prerequisites; issuance; nonassignability

(1)(a) No person shall act as a dealer unless he holds a valid dealer's

license issued by the department.

* * *

(2) To procure a dealer's license, a person shall file with the department an application in such form as the department may prescribe, with a bond. No license shall be issued upon any application unless accompanied by such bond, except as provided in s. 206.90(1).

* * *

(4) At the time of filing an application for a license, a filing fee of $5 shall be paid to the department for deposit into the general revenue fund.

(5) All requirements of this section having been complied with, the department shall issue to the applicant a license, and such license shall remain in effect until canceled as provided in this part.

* * *

206.91. Tax reports; computation and payment of tax

(1) For the purpose of determining the amount of tax imposed by s. 206.87, each dealer shall, not later than the 20th day of each calendar month, mail to the department, on forms prescribed by the department, monthly reports which shall show such information on inventories, purchases, nontaxable disposals, and taxable sales in gallons of each type of special fuel, including, but not limited to, diesel [fuel] ....

* * *

Supreme Court, U.S.
FILED

No. 01-160

AUG 27 2001

CLERK

IN THE

Supreme Court of the United States

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida First District

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REPLY TO BRIEF IN OPPOSITION

SUSAN L. KELSEY*
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

Counsel for Petitioner

*Counsel of Record

August 27, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution require that a state taxing the full and unapportioned value of transactions in interstate commerce provide taxpayers a credit for taxes paid on the same goods in other jurisdictions?

2. Does the Commerce Clause of the United States Constitution require a state to have nexus with the taxpayer, in addition to nexus with the transaction, in order to tax a transaction in interstate commerce?

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IN THE

Supreme Court of the United States

No. 01-160

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida First District

REPLY TO BRIEF IN OPPOSITION

The brief in opposition filed by Respondent, the Florida Department of Revenue (the "Department"), fails to identify any perceived misstatements of fact in the Petition. SUP. CT. R. 15.2.

The Department claims that TA Operating "ignores" the existence of a Florida statute making a $5 special fuel dealer's license a prerequisite to exemption from the tax. Br. Opp. 1. To the contrary, TA Operating expressly noted in its Petition that the trial judge's ruling made licensure a prerequisite to Commerce Clause protections. Pet. 4 & App. 18a. TA Operating went on to note that the appellate court expressly rejected the trial court's reasoning (which the Department had advanced on appeal):

> We *reject* DOR's reading of the licensure statute as purporting to make such licensure a precondition to rights the Commerce Clause confers.

App. 3a (emphasis supplied).

The Florida appellate court rejected the Department's licensure arguments on state law principles of statutory construction, instead interpreting the statute as evidencing appropriate deference to federal constitutional protections. App. 3a-4a ("Properly construed, the statute does not purport to make licensure a prerequisite for invoking rights under the Commerce Clause or any other constitutional provision."). The Department offers no reason to reverse the appellate court's decision on this point and revert to the trial court's analysis. Instead, the Department describes its licensure argument as its "unifying theme," Br. Opp. 9, a demonstrably unsound foundation for opposition to TA Operating's petition.

Under the Supremacy Clause, article VI, clause 2 of the United States Constitution, Florida's fuel tax license requirements may not infringe upon Commerce Clause protections afforded to TA Operating. A state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" conflicts with federal constitutional law and is invalid. *Witco Corp. v. Beekhuis*, 38 F.3d 682, 687 (3d Cir. 1994) (quoting from *California Federal S&L Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987)). Any state's right to configure its own tax system is restricted by federal constitutional limitations on that right. Florida may not design or apply its tax system, including its licensure requirements, in a way that violates federal law.

Federal constitutional protections apply with special force in revenue-raising tax cases such as this, as contrasted with regulations in the exercise of a state's police power. *Freeman v. Hewitt*, 329 U.S. 249, 253 (1946) ("[b]ecause the greater or more threatening burden of a direct tax on commerce is

coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce."), *abrogated on other grounds in Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977). The special fuels tax at issue is a dedicated excise tax, created for the exclusive purpose of raising revenue for road maintenance, repair, construction, and related expenses. Fla. Stat. Ann. § 206.85 (West 1993). Accordingly, it is subject to more strict review, which it cannot withstand. This tax violates the Commerce Clause, and thus also the Supremacy Clause.

The Florida appellate court properly rejected the Department's argument that the state's licensure requirement could stand as a complete obstacle to TA Operating's federal constitutional protections. This invalid argument having been the sum and substance of the Department's brief in opposition and self-described as the Department's "unifying theme," the Court should reject it and summarily reverse the decision of the Florida First District Court of Appeal, remanding with instructions to enter judgment in favor of TA Operating.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING A CREDIT MECHANISM TO ENSURE FAIR APPORTIONMENT OF TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

The Department's brief in opposition asserts that the transactions at issue were not in interstate commerce and therefore were not protected by the Commerce Clause. Br. Opp. 3-4. The undisputed facts, however, establish that title to the fuel passed to TA Operating simultaneously with the pumping of the fuel directly from the overhead loading rack into a common carrier's trucks for immediate shipment out of

Florida. Under this Court's precedents, each such sale and shipment was a single interstate transaction protected by the Commerce Clause.

Where a sale and immediate shipment of goods are part of a single event taking the goods across state boundaries, a state tax on the sale is subject to the four-part test of *Complete Auto Transit*, 430 U.S. at 279. This Court has explained the breadth of interstate commerce under similar circumstances:

> The incidence of the tax here at issue . . . is Appellants' "taking" of gas from [the] Plant . . . after the gas has been produced, gathered, and processed by others than Appellants. *The "taking" into Appellants' pipelines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce.* . . . This economic process is inherently unsusceptible of division into a distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-68 (1954) (emphasis supplied). The *Michigan-Wisconsin Pipe Line* Court relied on *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946) (invalidating under Import-Export Clause a sales tax on oil sold from storage and loaded directly onto a foreign-bound ship). After determining that what constitutes an "export" is intertwined with what constitutes "interstate commerce," *id.* at 76, the *Richfield Oil* Court explained that a single event *both* passed title *and* commenced exportation:

> The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods.

Id. at 81 (quoting *A.G. Spalding and Brothers v. Edwards*, 262 U.S. 66, 69-70 (1923)). Like the taxes nullified in *Michigan-Wisconsin Pipe Line* and *Richfield Oil*, the Florida fuel tax at issue here was imposed when the fuel entered the stream of commerce. Fla. Stat. Ann. § 206.87(1)(a) (West 1993) (tax imposed on the first sale or transfer of title in Florida). App. 21a. The sale of the fuel to TA Operating as it passed into the common carrier's trucks also marked the beginning of interstate commerce and was not a distinct "local event." Thus, Commerce Clause protections are implicated.

The Department's brief in opposition next asserts that "[b]ecause the entire sale took place in Florida, there was nothing to apportion." Br. Opp. 5. That contention misses the mark. TA Operating has never contended that the Florida tax must be apportioned; rather, TA Operating contends that the tax violates the internal consistency test of *Complete Auto Transit*, which requires a hypothetical replication of Florida's tax scheme in every other state, because it was imposed on the "first sale or transfer of title within this state" without a corresponding credit for excise taxes previously paid to other states on the same fuel. Pet. 11-14; App 21a. The sales tax cases cited by the Department, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), and *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963), are equally unavailing. The tax systems at issue in both of those cases afforded a credit for taxes paid on the same goods in another state. *See* Pet. 14. Florida's fuel tax system did not.

Finally, the Department makes no attempt to defend the Florida appellate court's use of a "*but see*" signal to dismiss this Court's controlling decision in *Michigan-Wisconsin Pipe Line*. App. 11a. The Florida appellate court's citation of *Michigan-Wisconsin Pipe Line* with a "*but see*" signal evidences that court's own recognition that the cases are not

materially distinguishable. The Department's weak attempt to distinguish the case, again on the grounds of the licensure issue, is unavailing. Br. Opp. 5-6. The Court should summarily reverse the decision under review upon the authority of *Michigan-Wisconsin Pipe Line*, and remand with instructions for entry of judgment in favor of TA Operating.

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING TAXPAYER NEXUS IN ADDITION TO TRANSACTION NEXUS FOR TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

The Department's brief in opposition offers no disagreement with TA Operating's argument that the law requires taxpayer nexus in addition to transaction nexus before a State may tax a transaction in interstate commerce. There remains, therefore, no dispute between the parties as to the error in the Florida appellate court's bald assertion that "No additional taxpayer nexus requirement exists." App. 8a. This Court should not allow this patent and undisputed error of law to stand uncorrected, but rather should summarily reverse the erroneous decision of the Florida appellate court.

The Department likewise does not dispute the facts that TA Operating itself never entered Florida, had no locations or business operations in Florida, no personnel in Florida, and no sales in Florida. The Department does not dispute that TA Operating's only contact with Florida was through the common carrier that collected the fuel at the point of sale and immediately transported it out of Florida to TA Operating's Brunswick, Georgia truckstop. The Department does not dispute that Florida law makes the common carrier itself liable for Florida fuel tax on an apportioned basis under Chapter 207, Florida Statutes (West 1993).

The Department's sole defense on this issue (before lapsing again into the licensure argument) is that TA Operating's use of a common carrier equated, for constitutional purposes, with TA Operating's own physical presence in Florida. Br. Opp. 7. This position is plainly at odds with this Court's decisions in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), *overruled on other grounds in Quill*, 504 U.S. at 307. These cases require that a taxpayer have a "substantial" physical presence in the taxing state, and establish a "safe harbor" rule that the use of a common carrier does *not* create the requisite presence. *Quill*, 504 U.S. at 315 n.8, 311-12; *Bellas Hess*, 386 U.S. at 758. The Department offers no meaningful distinctions between this case and *Quill* or *Bellas Hess*, concluding simply that without an exporter's license, TA Operating could be treated as the ultimate retail consumer in Florida for tax purposes. Br. Opp. 8. As already discussed, Florida's nominal licensure requirement cannot validly stand as an obstacle to TA Operating's Commerce Clause rights, and thus the Court should reject the Department's position and adhere to the safe harbor rulings of the Court's own precedents, summarily reversing the Florida decision to the contrary.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Florida court, remanding with instructions that judgment be entered in favor of TA Operating.

Respectfully submitted,

SUSAN L. KELSEY*
MARK E. HOLCOMB
HOLLAND & KNIGHT LLP
315 South Calhoun Street
Tallahassee, FL 32301
(850) 224-7000

*Counsel of Record

Counsel for Petitioner

August 27, 2001